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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 97-248
	)	RM No. 9097
	)	
Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

COMMENTS OF DIRECTV, INC.

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COMMENTS OF DIRECTV, INC.

DIRECTV, Inc. ("DIRECTV")[1] respectfully submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[2]

I. INTRODUCTION AND SUMMARY

More than five years after the passage of the 1992 Cable Act, incumbent cable operators and their affiliates continue to possess both the incentive and ability to leverage their market power at the expense of alternative multichnnel video programming distributors

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1 DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, Inc., a licensee in the DBS service and wholly-owned subsidiary of Hughes Electronics Corporation.

2 DIRECTV previously supported Ameritech New Media's Petition for Rulemaking that resulted in the NPRM. *See* Comments of DIRECTV, Inc. (July 2, 1997).

("MVPDs"). In its recently-released report to Congress on the state of competition in the MVPD marketplace,[3] the Commission found, among other things, that:

- "Local markets for the delivery of video programming generally remain highly concentrated and are still characterized by some barriers both to entry and expansion by competing distributors";[4]
- Incumbent cable systems still represent by far the dominant mode of multichannel video programming delivery, enjoying 87 percent market share of overall MVPD subscribership;[5]
- The market share of the four largest MVPDs -- not coincidentally also the four largest cable multiple system operators ("MSOs") -- increased during 1997 to 54.3 percent;[6]
- Cable companies continued to expand their presence -- and power -- in the media and entertainment industry, as vertical integration of programming grew in absolute terms, and represents 40 percent of all national satellite-delivered cable programming services;[7]
- Across the nation, cable television rates rose steeply over the last year at an average rate of 8.5 percent.[8]

These findings demonstrate conclusively that effective competition in the MVPD market has yet to be realized nationwide, and remains a distant prospect in most local MVPD markets.

The 1997 Report also leaves no doubt, however, that competition is a goal that the Commission should continue to strive mightily to achieve. In the few areas of the country where effective competition has developed, incumbent cable operators have responded to the increased competition exactly as Congress envisioned -- with lower rates, improved service, better facilities

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3 *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Doc. No. 97-141, FCC 97-423 (released Jan. 13, 1998) ("*1997 Report*").

4 *Id.* at ¶ 11, Overview of Video Programming Distribution Market.

5 *Id.* at ¶ 150, Table E-1.

6 *Id.* at ¶ 151.

7 *Id.* at ¶¶ 158-59.

8 *Id.* at ¶ 11, Overview of Video Programming Distribution Market: Market Participants.

and equipment, and increased or higher-quality program offerings.[9] Along these lines, one positive development reflected in the 1997 Report is the rise in DBS subscribers, with DBS providers, including Primestar's medium-power direct-to-home ("DTH") service, serving over 5.1 million subscribers as of June 1997.[10] But even though DBS service "constitutes the most significant alternative to cable television,"[11] the service has far to go before it can become a true alternative to cable's MVPD dominance. Furthermore, because of the cable industry's market power and still rapidly consolidating market position, DBS providers and other alternative MVPDs remain particularly vulnerable to anticompetitive abuses by that entrenched industry. The continued threat -- and presence -- of anticompetitive behavior by market-dominant cable operators is why the need for alternative MVPDs to obtain fair and nondiscriminatory access to cable-affiliated programming remains as compelling today as it was when the 1992 Cable Act was first enacted.

Since their adoption in 1993, the Commission's program access rules implementing Section 628 of the Communications Act[12] have been a critical first step in addressing and curbing the market power of incumbent cable monopolists. Arguably, the rules' most valuable contribution has been the threat of their enforcement, which has prompted cable-affiliated programmers generally to "come to the table" with alternative MVPDs. However, cable operators and vertically integrated programmers continue to engage in unlawful behavior

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9 *See id.* at ¶¶ 178-210.

10 *Id.* at ¶ 55.

11 *Id.* at ¶ 11, Overview of Video Programming Distribution Market.

12 47 U.S.C. § 548.

that obstructs alternative MVPDs' nondiscriminatory access to programming.[13] In light of the discouraging findings contained in the 1997 Report, the Commission recognizes that it must "continue to strive to make a competitive marketplace a reality for all consumers."[14] In DIRECTV's view, fulfilling this objective -- *i.e.*, promoting competition in the MVPD marketplace and thereby ensuring consumers greater choices and improved service at the lowest possible price -- requires the Commission to step up its regulatory oversight to eliminate anticompetitive strategies by cable interests that will inhibit the growth of alternative MVPD competition.

The fundamental substantive question raised in this proceeding is whether the Commission has the jurisdiction and legal authority to address cable industry strategies intended to evade the application of program access requirements. One such strategy is becoming known as "terrestrial evasion." Technological advancements that have diminished the costs of delivering programming terrestrially, coupled with efforts of cable MSOs to cluster or trade their systems to form broad, contiguous service areas, have created an environment where terrestrial distribution is becoming a more viable method of delivering regional and national programming from production facilities to cable headends. And with access to increasingly large geographic

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13 *See, e.g., Corporate Media Partners v. Rainbow Programming Holdings*, Memorandum Opinion and Order, File No. CSR-4873-P, DA 2040 (released Sept. 23, 1997); *Bell Atlantic Video Services Company v. Rainbow Programming Holdings, Inc.*, Memorandum Opinion and Order, File No. CSR-4983-P (released July 11, 1997) ("Bell Atlantic Order"); *see also Echostar Communications Corp. v. Fox/Liberty Networks, LLC, fx Networks, LLC*, File No. CSR-5165-P (Nov. 24, 1997) (pending); *Echostar Communications Corp. v. Fox/Liberty Networks, LLC, Fox Sports Net LLC, Fox Sports Direct*, File No. CSR-5138-P (Oct. 27, 1997) (pending); *Echostar Communications Corp. v. Rainbow Media Holdings, Inc.*, File No. CSR-5127-P (Oct. 14, 1997) (pending); *DIRECTV, Inc. v. Comcast Corp.*, File No. CSR-5112-P (Sept. 23, 1997) (pending).

14 *1997 Report* at ¶ 10.

regions, incumbent cable operators have begun to perceive terrestrial distribution as a new tactic to insulate themselves from program access requirements. In at least one major market -- Philadelphia -- the incumbent cable operator, Comcast, has migrated cable programming formerly delivered by satellite to a terrestrial mode of delivery, and has deliberately refused to sell its programming to DIRECTV and other DBS providers, based simply on the position that it does not have to since the programming is no longer satellite-delivered. Comcast claims that Section 628 of the Communications Act applies only to "satellite cable programming,"[15] and therefore, that Comcast's refusal to sell is simply beyond the scope of the Act and the Commission's power to address. Other cable operators have suggested that they will follow Comcast's lead if the Commission declines to intervene.[16]

There is little question, as the Commission recently observed in response to an inquiry by U.S. House Telecommunications Subcommittee Chairman, W.J. ("Billy") Tauzin, that "*regardless of the method of delivery*, where programming is unfairly or anti-competitively withheld from distribution, competition is deterred or impeded."[17] Furthermore, Comcast and

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15 "Satellite cable programming" means "video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers." 47 U.S.C. § 605(d)(i); *see* 47 U.S.C. § 548(i)(1).

16 *See, e.g.,* Statement of Joshua Sapan, President and Chief Executive Officer, Rainbow Media Holdings, Inc. before the Committee on the Judiciary, United States House of Representatives at 9 (Sept. 24, 1997) (testifying that Rainbow, a subsidiary of Cablevision Systems, Inc., is currently committing substantial resources to develop a terrestrially-delivered programming venture to be offered exclusively to cable operators).

17 *See* Responses to Questions, Subcommittee on Telecommunications, Trade, and Consumer Protection, Committee on Commerce at 7 (emphasis added), *attached to* Letter from William E. Kennard, Chairman, FCC to W.J. ("Billy") Tauzin, Chairman, Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, U.S. House of Representatives (Jan. 23, 1998) ("Tauzin Response").

the rest of the cable industry are mistaken in their views with respect to the Commission's ability to enforce its rules when confronted with such unfair or anticompetitive conduct. As explained below, Congress granted the Commission the clear authority and mandate to address evasion strategies of cable operators and their affiliates that hinder or deprive competitors from gaining access to satellite-delivered programming. In this regard, the migration of "satellite cable programming" to terrestrial delivery modes, coupled with a corresponding refusal to sell such programming to a class of MVPD competitors, falls squarely within the protective sweep of *current* statutory program access provisions.

First, the plain language of Section 628(b) proscribes "unfair methods of competition or unfair or deceptive acts or practices, *the purpose or effect* of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers."[18] If a programmer's shift from satellite to terrestrial delivery is part of an anticompetitive strategy that has the "purpose or effect" of hindering or preventing an MVPD from serving its subscribers by denying those subscribers programming that is or has been satellite-delivered, then the scenario plainly falls within Section 628(b)'s proscription.

Second, even beyond a straightforward violation of Section 628(b), terrestrial evasion by cable operators also can violate the more specific provisions of Section 628(c). Employing traditional tools of statutory construction, when the term "satellite cable programming" is informed by the language, structure, and procompetitive purposes of Section

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[18] 47 U.S.C. § 548(b) (emphasis supplied).

628, the Commission can, and should, interpret the term to encompass programming that was formerly delivered by satellite but converted to terrestrial delivery to evade the statutory requirements.

In addition to supporting the Commission's exercise of its authority to address evasive terrestrial distribution tactics, DIRECTV supports the targeted adjustments to the rules governing the program access complaint process that have been suggested in the NPRM. To better effectuate congressional intent, the Commission should: (1) award damages in appropriate cases for violations of the program access rules; (2) establish a reasonable but firm deadline for the resolution of all program access complaints; and (3) establish a right to discovery as a matter of course for program access plaintiffs. These revisions to the program access rules will permit more meaningful and vigorous enforcement of Section 628 in the manner that Congress intended, with the overall benefits flowing directly to the American viewing public.

II. DIRECTV'S INTEREST IN THIS PROCEEDING

DIRECTV is the nation's leading provider of DBS services. When DIRECTV launched its first satellite just over three years ago -- after a ten-year effort and a $750 million investment -- DIRECTV was committed to providing the American viewing public with an effective multichannel video alternative to incumbent cable television systems. While DIRECTV has made some headway toward accomplishing that goal -- DIRECTV currently delivers 175 channels of entertainment, educational, and informational programming directly to more than 3.3 million subscribers nationwide -- legal, regulatory, and structural market

conditions have prevented DIRECTV, and DBS providers in general, from achieving a competitive position on par with local cable operators.[19]

The program access law has played a crucial role in DIRECTV's success so far in providing consumers with a multichannel video programming alternative to the programming transmitted by their local monopoly cable providers. Indeed, DIRECTV has no doubt that, but for the existence of the program access law -- and the Commission's implementing rules and oversight -- DIRECTV would not have been able to gain access to a significant amount of the cable-affiliated programming that has been and remains indispensable to DIRECTV's ability to compete.[20]

The NPRM in this proceeding has identified areas in which the Commission's program access rules and their enforcement can be strengthened -- an end result that is extremely important for continued growth in the still-emerging DBS industry and for overall competition in the MVPD marketplace. DIRECTV therefore has a vital interest in this proceeding.

III. DISCUSSION

When Congress added Section 628 to the Communications Act of 1934[21] more than five years ago, it recognized that access for all MVPDs to vital programming controlled by incumbent cable operators or their vertically integrated programming affiliates is essential to developing robust competition in local multichannel video programming markets. Congress was

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19 1997 Report at ¶ 15, Table B-1, Table C-5.

20 Testimony of Lawrence N. Chapman, Executive Vice President, DIRECTV, Inc. on Video Competition: Access to Programming, before the Subcommittee on Telecommunications, Trade, and Consumer Protection, U.S. House of Representatives (Oct. 30, 1997) ("Chapman Testimony") at 4.

21 47 U.S.C. § 548.

particularly concerned that incumbent cable operators stood in a position to exercise leverage over affiliated programmers in order to deny or restrict new entrants' access to critical programming. Congress reasoned that alternative MVPDs could not compete against the incumbent cable industry "[w]ithout fair and ready access" to programming "on a consistent, technology-neutral basis," and concluded that "without such access, an independent entity cannot sustain itself in the market."[22] Congress therefore envisioned, and designed, a regulatory framework intended to constrain the unfettered exercise of market power by cable operators and their affiliates, which otherwise have the incentive and ability to thwart emerging competition in the MVPD market.

Central to this regulatory framework is the Commission's power and resolve to enforce Section 628's requirements. The Commission should aggressively pursue whatever regulatory action is necessary "to give the American public as much choice and value as can be achieved" in the MVPD market.[23] Such action should include the prevention of cable industry tactics that undermine the letter and intent of the Commission's program access rules, and the implementation of rule changes that will increase the number of tools that the Commission may utilize to promote competition and deter anticompetitive conduct.

A. The Commission Has The Authority And Responsibility To Address The Evasion Of Program Access Rules Through Terrestrial Delivery

The past few years have seen several of the nation's largest cable operators increasingly cluster their systems to the point that distribution of national or regional cable

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22 H. Rep. No. 628, 102d Cong., 2d Sess., at 30 (1992).

23 1997 Report, *Separate Statement of Chairman William E. Kennard*, at 6.

programming services by terrestrial means is now a feasible option.[24] Although such wide-scale terrestrial distribution may not have been expressly contemplated when Congress enacted the program access law, there is no policy reason why such programming should be treated differently than "satellite cable programming."[25] In any event, the law as written clearly covers terrestrial evasion strategies that have the purpose or effect of denying MVPD competitors access to programming that was previously, or that otherwise would have been, satellite-delivered. To the extent that such circumstances arise, the Commission should vigorously enforce the current law and its rules, *which require no amendment on this point.*

1. Cable Companies Have Begun To Convert "Satellite Cable Programming" To Terrestrial Delivery For The Express Purpose Of Evading Program Access Requirements

Cable interests in fact have begun utilizing terrestrial delivery modes for the express purpose of circumventing program access requirements, forcing DIRECTV to file its first-ever program access complaint with the Commission. Comcast, the nation's fourth-largest cable MSO, owner of several Philadelphia professional sports franchises, and the dominant MSO

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24 Clustering is a process by which cable MSOs consolidate system ownership within separate geographical regions. The 1997 Report observes that cable MSOs have undertaken or announced numerous transactions with the objective of creating regional clusters of contiguous cable systems. 1997 Report at ¶ 142. Moreover, the trend appears for clusters to be increasing in size. *Id.* at ¶ 144; *see also* Tauzin Response at 6 (noting that there "has been a trend toward a greater linkage of cable systems in regional clusters through fiber optic connections which are now much more generally available," and that "these facilities, once in place, would typically have the capacity to distribute a number of channels of service").

25 DIRECTV would support legislative efforts to amend Section 628 to clarify that vertically integrated cable programming must be made available to competing MVPDs regardless of the physical means of distribution. The delivery mode simply is not relevant to Congress's intent to promote competition to and forbid anticompetitive behavior by cable operators exercising MVPD market power. *See* Tauzin Response at 7 (noting that "competition is deterred or impeded" when programming is unfairly withheld "regardless of the method of delivery").

in the Philadelphia area, has deliberately attempted to evade the program access rules by distributing Comcast SportsNet -- a regional sports network that offers Philadelphia 76ers basketball, Flyers hockey and Phillies baseball games, along with Philadelphia-area college sports events -- using terrestrial rather than satellite facilities.[26] Comcast SportsNet replaced SportsChannel Philadelphia, a satellite-delivered regional sports network previously carried on DIRECTV, and carries a significant amount of the same sports programming, yet Comcast has made Comcast SportsNet available only to cable operators and other select terrestrially-based providers. Comcast has refused to make Comcast SportsNet available to DIRECTV or other DBS providers as a class -- indeed, DIRECTV could not even obtain a price quote for the new network.[27] Comcast's actions have directly and deliberately resulted in the disenfranchisement of some 43,000 Philadelphia-area residents from accessing Philadelphia-area sports on DIRECTV, as well as more than 100 Philadelphia-area commercial establishments and hundreds of thousands of DIRECTV subscribers purchasing out-of-market sports packages.[28]

In a recent interview, Brian Roberts, the President of Comcast Corporation, concisely summarized the intent behind the formation of Comcast SportsNet:

> Comcast's purchase of the Philadelphia Flyers, 76ers, and Phantoms inspired the company to start up a regional sports network, which debuts this month as a basic cable-service channel. The question now is whether Roberts can capitalize on an apparent loophole in the 1996 Telecommunications Act [sic] in order to lock up the Philly area's sports programming. "*We don't like to use the*

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26 *See DIRECTV, Inc. v. Comcast Corporation, Comcast-Spectacor, L.P. and Comcast SportsNet*, File No. CSR-5112-P (September 23, 1997) (pending).

27 *See* Chapman Testimony at 6.

28 *See DIRECTV v. Comcast Corp., et al.*, File No. CSR-5112-P (Sept. 23, 1997), *Complaint* at Attachment 4, ¶ 5 (Declaration of Richard E. Goldberg, DIRECTV, Inc.).

> *words 'corner the market,' because the government watches our behavior*," Roberts says with a laugh. "Let's just say we've been able to do things before they're in vogue."[29]

Mr. Roberts effectively has admitted that Comcast created Comcast SportsNet in order to "lock up" the Philadelphia-area sports programming and deprive its strongest class of competitors access to essential regional sports programming.

DIRECTV believes that Comcast's motivation is purely anticompetitive -- *i.e.*, to prevent DBS providers, the class of alternate MVPDs that today poses the most formidable threat to cable operators' incumbency, from being able to continue to offer essential cable-affiliated programming. But even if Comcast's "purpose" in creating Comcast SportsNet and refusing to sell the network to DIRECTV were unclear, the "effect" of Comcast's behavior is unassailable. As a direct consequence of Comcast's actions, DIRECTV subscribers in the Philadelphia area and across the country lost overnight the ability to view Philadelphia regional sports programming.

Comcast's behavior is particularly alarming because it has chosen the lucrative and indispensable realm of regional sports programming to test the Commission's resolve to enforce the program access rules with respect to terrestrial evasion. Furthermore, the tactics employed by Comcast in Philadelphia presage future cable industry behavior.[30] If the

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29 The New Establishment -- Vanity Fair's Fifty Leaders of the Information Age, Vanity Fair, October 1997, at 166 (emphasis supplied).

30 Following in Comcast's wake, Cablevision has announced plans to launch a fiber-based version of its popular satellite-delivered regional sports network, New York SportsChannel, in its New York hub, where it has substantial interests in regional sports franchises (the NBA Knicks and the NHL Rangers) and venues (Madison Square Garden and Radio City Music Hall). Cablevision founder Chuck Dolan reportedly desires "to restrict distribution of SportsChannel

Commission fails to address the explicit evasion of program access requirements, cable operators across the country will not hesitate to use terrestrial delivery as a means of bypassing the law, which unquestionably will result in the handicapping of MVPD competition.

2. "Terrestrial Evasion" Currently Is Addressable Through A Straightforward Application Of Section 628(b)

The Communication Act's program access provisions provide the explicit legal authority and public policy mandate for the Commission to address terrestrial evasion of program access requirements.

Turning first to the text of the statute, moving satellite cable programming to a means of terrestrial delivery in order to lock out an MVPD competitor, or class of competitors, constitutes a straightforward violation of Section 628(b). The Commission specifically has suggested that a Section 628(b) complaint is the appropriate mechanism for it to address "conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs."[31] Section 628(b), a broad prohibition on unfair competitive practices by cable operators and their vertically integrated programming affiliates, states:

> It shall be unlawful for a cable operator, [or] a satellite cable programming vendor in which the cable operator has an attributable interest . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers.[32]

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groups of services his Rainbow Holdings controls to *cable systems only*." Satellite Business News (Oct. 8, 1997), at 3 (emphasis supplied).

31 *See OVS Second Report and Order,* 11 FCC Rcd 18223, 18325 n. 451.

32 47 U.S.C. § 548(b).

Terrestrial evasion meets all of the elements of this statutory prohibition. In situations such as the one that DIRECTV faces in Philadelphia, in which a cable operator migrates satellite-delivered programming to a terrestrial distribution system and then uses terrestrial distribution as an excuse to deny program access to a requesting competitor, (i) a cable operator or its associated program vendor (ii) has unfairly refused to provide an MVPD competitor nondiscriminatory access to programming that it has made available to cable operators or another class of MVPDs, (iii) the purpose *or* effect of which is to hinder significantly or to prevent that MVPD from providing satellite cable programming to its subscribers.[33] The anticompetitive conduct arises not simply from the transition of satellite cable programming to an exclusively terrestrial infrastructure, but rather from the intentional denial of formerly satellite-delivered programming to MVPD competitors without any legitimate business justification. A cable operator's or cable-affiliated programmer's refusal to sell to competing distributors is exactly the type of "unfair practice" proscribed by Section 628(b).[34]

Moreover, counteracting evasion of program access requirements through Section 628(b) complaints is entirely consistent with congressional intent in enacting the provision and in granting the Commission power to administer the provision's application. Section 628 is

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33 *See* 47 U.S.C. § 548(b). Because Section 628(b) applies on the basis of "purpose *or* effect," the Commission surely cannot read the word "effect" out of the statute as it implies in the NPRM. *See* NPRM at ¶ 51.

34 *See Program Access Order*, 8 FCC Rcd at 3412 ¶ 116 (suggesting that a vendor's refusal "to sell programming to a class of distributors, or refusing to initiate discussions with a particular distributor when the vendor has sold its programming to that distributor's competitor" are each forms of impermissible non-price discrimination); *OVS Second Report and Order*, 11 FCC Rcd. at 18324, ¶ 194 (refusal to sell is "unreasonable" if it "discriminates against a class of distributors"); *Bell Atlantic Order* at ¶¶ 5, 17-18, 24-25.

designed "to provide a mechanism for addressing those types of conduct, primarily associated with horizontal and vertical concentration within the cable and satellite programming field, that inhibit the development of multichannel video distribution competition."[35] The Commission has always acknowledged the broad sweep of Section 628(b):

> [A]lthough the types of conduct more specifically referenced in the statute, i.e., exclusive contracting, undue influence among affiliates, and discriminatory sales practices, appear to be the primary areas of congressional concern, *Section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming.*[36]

That Congress intended Section 628(b) to address anticompetitive conduct not specifically identified, or even anticipated, at the time of its enactment is further evidenced by Congress' specification of only the "minimum" content of program access regulations.[37] The Commission in fact has noted that Congress "did not limit the Commission to adopting rules only as set forth in that statutory provision," but instead granted the Commission authority, and expected the Commission to adopt, additional rules or to take additional action "that will advance the purposes of Section 628."[38] Thus, the Commission clearly has the authority to address

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35 *Program Access Order*, 8 FCC Rcd at 3374, ¶ 41.

36 *Id.* (emphasis supplied); *see OVS Third Report and Order*, 11 FCC Rcd 20227, 20300, ¶ 169; *OVS Second Report and Order*, 11 FCC Rcd 18223, 18320, ¶ 186.

37 *See* 47 U.S.C. § 548(c)(2).

38 *OVS Third Report and Order*, 11 FCC Rcd at 20300, ¶ 169; *see* 1992 Cable Act Conference Report, H.R. Rep. 102-862 at 93 ("In adopting rules under this section, the conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory rates to non-cable technologies. The conferees intend that the Commission shall encourage arrangements

terrestrial evasion, at least when the evasion strategy has the "purpose or effect" of denying a competitor access to previously satellite-delivered programming. Indeed, failure of the Commission to address and counteract evasion would constitute abdication of the agency's authority to adopt additional rules or interpretive approaches "should additional types of conduct emerge as barriers to competition."[39] It would also undermine the intent of Congress in enacting program access laws, directly injure consumers, and inhibit the development of competition in the MVPD marketplace. Accordingly, issues arising from conversion of satellite-delivered programming to terrestrial distribution systems more aptly concern the *scope* of unfair practices prohibited by Section 628(b), not the Commission's *authority* to decide what constitutes an unfair practice.

That evasion falls within the scope of unfair practices proscribed under the statute is also clear. The Commission has been monitoring this type of conduct for years, vowing to step in at the appropriate time. In the 1994 Video Competition Report, for example, the Commission pledged to monitor cable industry conduct involving programming that is not delivered via satellite.[40] In the 1995 Video Competition Report, the Commission again acknowledged terrestrial evasion concerns, but confronted "no specific evidence regarding

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which promote the development of new technologies by providing facilities-based competition to cable and extending programming to areas not served by cable.").

39 *Program Access Order*, 8 FCC Rcd at 3374, ¶ 41.

40 *1994 Competition Report*, 9 FCC Rcd 7442, 7531, ¶ 181-182 (responding to Liberty Cable's prediction that "unless corrected, the problem [of evasion of program access protections through terrestrial distribution] will grow in the future because vertically integrated programming vendors will have the incentive to modify the distribution of their programming, using fiber optics or other non-satellite means, in order to evade application of the program access requirements").

anticompetitive behavior that would require further action at this time."[41] In 1996, a number of parties argued that "delivery of programming by terrestrial means instead of via satellite may permit cable operators to abuse vertical relationships between themselves and programmers."[42] Again, the Commission explained that when presented with evidence of such conduct, it would at that time "consider an appropriate response to ensure continued access to programming."[43] The appropriate time to address evasion concerns has now arrived, for the problem has materialized in Philadelphia, and cable operators across the country are poised to replicate it, depending on the Commission's response.

The Commission must carry through on its pledge to ensure continued access to programming for all classes of MVPD competitors. Under the statute as written, the Commission need not find that terrestrially-delivered programming is "satellite cable programming" in order to take action against evasive tactics by cable operators and their affiliated program vendors under Section 628(b). That Section 628 may be focused on ensuring access to "satellite cable programming"[44] begs the question. A cable operator or vertically-integrated programming affiliate that has converted its programming to terrestrial delivery is in no way exempted from Section 628(b)'s proscription against unfair practices; thus, the Commission does not need to "extend[] program-access rules to terrestrially-delivered

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41 *1995 Video Competition Report* at ¶ 168.

42 *1996 Video Competition Report* at ¶ 153.

43 *Id.* at ¶ 154.

44 *See* NPRM, *Separate Statement of Commissioner Harold W. Furchtgott-Roth.*

programming"[45] if a cable operator has taken action that has the "purpose or effect" of denying -- or of taking away -- a competitor's access to satellite-delivered programming.

3. "Terrestrial Evasion" Also Can Be Addressed Through Section 628(c) As The Denial Of "Satellite Cable Programming" To An Alternative MVPD

Because the Commission can counteract most evasive attempts through a straightforward application of Section 628(b), it will often not need to consider whether evasive conduct also violates the more specific provisions of Section 628(c). However, DIRECTV believes that the Commission has ample authority under Section 628[46] to construe Section 628(c) as also prohibiting the type of conduct involved when a cable operator discriminates against or refuses to sell formerly satellite-delivered programming to a class of MVPD competitors.

Specifically, migrating satellite-delivered cable programming to terrestrial delivery modes should be found to violate the requirements of Section 628(c)(2)(A) and (B) and 47 C.F.R. §§ 76.1002. Section 628(c)(A)(2) prohibits a cable operator from unduly or improperly influencing the decision of a "satellite cable programming vendor" to sell, or the prices terms and conditions of sale of, satellite cable programming to unaffiliated MVPDs.[47] Section 628(c)(2)(B) prohibits a "satellite cable programming vendor" in which a cable operator

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45 *Id.*

46 The Commission of course has other sources of authority as well. *See* 47 U.S.C. § 154(i) (FCC "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Communications Act], as may be necessary in the execution of its functions"); 47 U.S.C. § 303(r) (granting FCC authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of" the Communications Act).

47 47 U.S.C. § 548(c)(2)(A); *see* 47 C.F.R. § 1002(a).

has an attributable interest from engaging in discrimination in the prices, terms or conditions of the sale or delivery of satellite cable programming to competing MVPDs.[48]

In both instances, the applicability of these provisions (unlike the broader prohibition of Section 628(b), which encompasses "cable operators" and focuses largely on the effects of anticompetitive conduct), hinges upon whether vertically integrated programming affiliates can be said to be "satellite cable programming vendors,"[49] which in turn rests upon whether the Commission can and should deem terrestrially-delivered programming converted from satellite delivery to be encompassed within the statute's definition of "satellite cable programming." Section 628(i) defines "satellite cable programming" by reference to Section 705 of the Communications Act, a provision addressing signal piracy.[50] Section 705 in turn defines "satellite cable programming" as "video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers."[51]

DIRECTV believes that once the traditional tools of statutory construction are invoked, the Commission should construe the term "satellite cable programming" as encompassing programming that was once "satellite cable programming" and would have continued to remain "satellite cable programming" but for the deliberate shift of the programming to terrestrial delivery modes to evade the program access requirements.

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48 47 U.S.C. § 548(c)(2)(B); see 47 C.F.R. § 1002(b).

49 *See* 47 U.S.C. § 548(i)(2) (defining a "satellite cable programming vendor" as "a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming.").

50 *See* 47 U.S.C. § 548(i).

51 47 U.S.C. § 605(d)(1).

Employing traditional tools of statutory construction, a statutory definition is informed by "provisions of the whole law, and . . . its object and policy."[52] As the D.C. Circuit has observed, "while the immediate statutory text is the 'best evidence' of congressional intent, the Court has never held that it is the only such evidence."[53] Other "indications of congressional intent" can create uncertainty about Congress's intended scope of a particular term that requires deference to the Commission's expert judgment and interpretation -- even when the text of the Communications Act is "superficially-clear."[54]

The Commission resolves interpretive questions pertaining to the program access laws in this manner, by relying not just on the language of the Act but also on (i) a careful analysis of the structure of Section 628 of the 1992 Cable Act, (ii) its legislative history, and (iii) the underlying policy objectives of the 1992 Cable Act.[55] The Commission has observed that this "is the process that previously has been followed in implementing the provisions of the 1992 Cable Act and in developing a coherent set of rules for their enforcement."[56] Because the Commission has traditionally utilized this approach, any deviation with respect to the issue of terrestrial evasion could lead to unintended and "anomalous results."[57]

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52 *National Cable Television Assoc. v. FCC*, 33 F.3d 66, 75 (D.C. Cir. 1994).

53 *American Scholastic TV Programming Foundation v. FCC*, 46 F.3d 1173, 1178 (D.C. Cir. 1995) (quoting *Tataranowicz v. Sullivan*, 959 F.2d 268 (D.C. Cir. 1992)).

54 *Id.* at 1178-80.

55 *Program Access Reconsideration Order*, 10 FCC Rcd at 3121, ¶ 32.

56 *Id.*

57 *See id.*

When a cable operator converts satellite cable programming to a terrestrial delivery mode for the express purpose of skirting program access requirements, the Commission can and should interpret "satellite cable programming" expansively to encompass such programming, given that it previously was satellite-delivered. Congress enacted the program access provisions to counterbalance the unfair hurdles that incumbent cable operators can and do throw in the path of emerging competitors. Congress's explicit purpose was three-fold:

> [1] to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, [2] to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and [3] to spur the development of communications technologies.[58]

As the Commission has observed, the "legislative history of Section 628 demonstrates Congress' deep concern with the cable industry's 'stranglehold' over programming through exclusivity and the market power abuses exercised by cable operators and their affiliated suppliers that deny programming to non-cable technologies."[59] Migrating satellite cable programming to terrestrial delivery serves only to increase cable operators' programming stranglehold, while creating insurmountable obstacles for emerging MVPD competitors. Thus, it makes perfect sense to interpret "satellite cable programming" in a manner that will prevent cable operators from using terrestrial distribution as a subterfuge to impede and eliminate non-cable MVPD competition. It would wholly undermine the intent of Congress to construe the term otherwise.

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58 47 U.S.C. § 548(a).

59 *Id.* (citation omitted).

There is clear precedent for the Commission to adopt this view. In *International Cablevision v. Sykes* the Second Circuit found that Section 705(e)(4),[60] which prohibits the unauthorized decryption of "satellite cable programming," could be extended to encompass the unauthorized interception of cable transmissions over coaxial cable -- *i.e.*, to cover pure terrestrial distribution -- notwithstanding the fact that the term appears to cover only satellite-delivered programming.[61] Although the court acknowledged that there were other "plausible" interpretations of Section 705, the court decided, after canvassing the legislative history and purpose of the provision, that the definition of "satellite cable programming" should *not* be read to limit the applicability of Section 705's signal theft provisions to satellite-borne transmissions.

Similarly, in adapting the program access regime to open video systems, the Commission interpreted the definition of "satellite cable programming" flexibly to include video programming "intended for direct receipt by OVS operators for the retransmission to OVS subscribers."[62] The Commission did so in order to effectuate the intent of Congress in enacting the OVS and program access provisions, notwithstanding the fact that the definition's literal language covers only programming intended for direct receipt by cable operators.[63]

In consideration of "reasonable inferences drawn from statutory scheme and policy"[64] the Commission should read the definition of "satellite cable programming"

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60 47 U.S.C. § 605(e)(4).

61 *International Cablevision, Inc. v. Sykes*, 75 F.3d 123, 131-32 (2d Cir. 1996). *But see United States v. Norris*, 88 F.3d 462, 468 (7th Cir. 1996) (disagreeing with *Sykes* rationale).

62 *OVS Second Report and Order*, 11 FCC Rcd at 18317, ¶ 180.

63 *Id.*

64 *Satellite Broadcasting and Communications Association v. Oman*, 17 F.3d 344, 347 (11th Cir. 1994).

expansively in order to preserve the integrity of its program access regime.[65] Courts will, in all likelihood, give "substantial deference" to an FCC interpretation of Section 628(c) as encompassing previously satellite-delivered cable programming.[66] A contrary interpretation would completely undercut the design and effectiveness of the program access laws and provide *carte blanche* for cable monopolists to stifle emerging MVPD competition.

B. The Commission Should Award Damages When Appropriate To Deter And To Compensate For Proven Program Access Violations

The Commission has correctly determined that Section 628(e)(1)'s grant of unbounded authority "to order appropriate remedies"[67] confers upon the Commission the power to remedy program access violations by awarding compensatory damages.[68] The Commission's current rules, however, do not explicitly provide for damage awards, and lead to perverse incentives for program access violators to persist in unlawful conduct and delay the Commission's program access complaint process.

Prospective injunctive relief simply does not return an alternative MVPD that has unfairly been denied access to programming or been forced to take programming at inflated prices or under discriminatory terms or conditions to the competitive position it maintained prior to the unlawful tactics of the incumbent cable operator or its affiliated programmer. Nor does it compensate for the resultant injury. Even if the cable-affiliated programmer or operator

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65 *See American Scholastic TV Programming Foundation v. FCC*, 46 F.3d 1173 (D.C. Cir. 1995).

66 *See National Cable Television Assoc. v. FCC*, 33 F.3d at 70 (giving "substantial deference" to FCC's interpretation of the Cable Act).

67 47 U.S.C. § 548(e)(1) (emphasis supplied).

68 *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd 1902, 1905, 1910-11 (1994) ("*First Reconsideration Order*").